

In these circumstances, I am of opinion, in answering the first question in the Special Case, that the antenuptial marriage contract was not and could not be infringed upon or prejudicially affected by the mutual disposition and settlement; that in answer to the second question, the mutual disposition and settlement was wholly revoked by the disposition and settlement and relative codicil of dates 14th February and 29th May 1873; that in answer to the third question, that the whole estates of Mr and Mrs Nielson existing at the death of the latter fall to be disposed of in terms of the said disposition and settlement, and relative codicil; and that the fourth question ought to be answered in the negative.

LORD NEAVES—I entirely concur.

LORD GIFFORD—I am of the same opinion. An antenuptial contract fixes the rights of parties; in particular it fixes conclusively whether a right granted by one party to another during the subsistence of the marriage is or is not a donation. Should there be no antenuptial contract then the question comes to be whether the postnuptial settlement is a rational and reasonable one or not. But if there is an antenuptial contract then the question as to any postnuptial contract comes to be, not whether it is rational and reasonable, but whether it is in accordance with the first contract. We find that Erskine states the law as follows—(b. i, tit. 6, sec. 30) "But where the interests of the husband and wife have been settled by an antenuptial contract, postnuptial deeds are revocable in so far as they either add to or diminish the provisions of the first contract without a valuable consideration on the other part, for every such provision adding to the wife's prior settlement is a donation by the husband to her; and every deed by which the wife renounces the least share of her former provision is a donation by her to the husband." This is a natural rule of law. My Lords, there can be no doubt that in the circumstances of the present case Mrs Nielson, the wife, by her postnuptial contract gave up part of the rights secured to her under the ante-nuptial contract, and accordingly, when we apply the rule of law to which I have referred, it is evident that such a surrender was revocable by the donor even after the death of her husband. The wife cannot even herself deprive herself of the rights secured to her by an antenuptial contract. Is there, then, anything here to prevent the widow exercising her undoubted right to revoke a donation? My Lords, I think there is not, and therefore I entirely concur.

LORD JUSTICE-CLERK—I am quite of the same opinion. I would merely add the suggestion that the finding of the Court in answer to the first question should be to the effect that the antenuptial contract "was not effectually altered" by the subsequent deed.

The Court answered the questions as follows:—

"The Lords having heard counsel for the parties to the Special Case, are of opinion and find:—

"1. That the ante-nuptial marriage contract, of date 3d December 1838, was not effectually altered by the mutual disposition and settlement of date 2d March 1867, so as to prevent the widow from subsequently revoking that deed.

"2. That the said mutual disposition and settlement was validly and wholly revoked by the disposition and settlement and relative codicil, dated respectively 14th February and 29th May 1873.

"3. That the estate which belonged to Mr and Mrs Nielson, or either of them, at the date of the dissolution of their marriage falls to be disposed of under and in terms of the said last-mentioned disposition and settlement and codicil.

"4. That the second party hereto is not entitled to the liferent of the subjects provided to him by the said mutual disposition and settlement.

"Find the parties of the first part entitled to the expenses incurred by them in connection with the Special Case, and remit to the Auditor," &c.

Counsel for First Party—Dean of Faculty (Clark), Q.C., and Adam. Agents—J. C. & A Stewart, W.S.

Counsel for Second Party—Solicitor-General (Watson) and Blair. Agents—Hunter, Blair, & Cowan, W.S.

Tuesday, May 18.

SECOND DIVISION.

[Lord Shand, Ordinary.

HOULDSWORTH *v.* BRAND'S TRUSTEES.

Proprietor and Tenant—Mineral Lease—Clause of Resumption—Bona Fides.

A mineral lease contained a clause to the effect "that the landlord was empowered, if he should so wish, to resume possession of the colliery if he should at any time be dissatisfied with the working thereof." In an action of declarator at the instance of the landlord against the representatives of the tenant: *Held* that the proprietor was entitled to resume possession on giving notice that he was dissatisfied with the working of the colliery, and that the onus lay on the defenders of proving that the notice was not made in *bona fide*.

The summons in this suit, at the instance of James Houldsworth, proprietor of Coltness, against the trustees of Robert Brand junior and Robert Brand senior, and various other parties, concluded for declarator that the pursuer was entitled to enter on and resume possession of the Greenhead oil coal and fireclay lying in and under that part of the estate of Coltness in the parish of Cambusnethan, viz., all and whole the coalfield represented on the tracing plan of the Ordnance Survey map appended to a lease thereof granted by the deceased Henry Houldsworth, father of the pursuer, to the deceased Robert Brand senior and Jonathan Hyslop, coalmasters at Wishaw, dated 9th and 28th November 1867; that the pursuer had right to acquire possession of the pits, plant, &c., at a valuation in terms of a minute of agreement dated 5th October 1869, and that the whole right of the defenders in the subject had come to an end.

The facts were as follows:—By lease dated 9th and 28th November 1867, entered into between the deceased Henry Houldsworth, father of the pursuer, on the one part, and Robert Brand and J. Hyslop, on the other part, the coal in certain fields on the property of Coltness was let to them and their heirs, excluding assignees and sub-tenants, for nineteen years from Martinmas 1865, under certain conditions. Brand and Hyslop entered into possession under the said lease, and wrought the minerals for some time, but ultimately disagreed, and it was arranged Hyslop should retire. On his retirement the pursuer, who had succeeded his father, entered into an agreement with Brand on 5th October 1869. By the said minute of agreement, on the narrative of the said lease, and of the tenants under the same having disagreed and being involved in litigation in the Court of Session, and that the said Robert Brand was desirous of obtaining the pursuer's acknowledgment of him as sole tenant under the said lease, it was agreed between them as follows—*first*, that in the event of the death of the said Robert Brand during the currency of the lease, the landlord was by the said agreement empowered, if he should so wish, to enter on and resume possession of the colliery and other subjects of lease at a valuation, as afterwards provided for, if he should at any time thereafter be dissatisfied with the working thereof by the representatives of the said Robert Brand, but that if the representatives of the said Robert Brand should not wish to carry on the operations of the said colliery after his death, they should, after first offering it for not less than thirty days to the pursuer or his successors in Coltness estate, at a valuation thereinafter provided for, have power to dispose of it to any other party approved by the landlord. It was by the said minute, in the second place, stipulated that in the event of the said Robert Brand falling into a state of health incapacitating him from giving his usual personal attendance, as at the date of the said minute, at or in connection with the business of the said colliery during the space of any six months, and the lordships payable to the pursuer or his forebears falling below the rate of £2000 sterling per annum during any such foresaid period of six months after the commencement of such illness, the landlord was then empowered, if he should so wish, to enter on and resume possession of the colliery and subjects connected therewith, at a valuation, as thereinafter provided for, and if the landlord should not exercise the power thereby conferred, that the said Robert Brand should, after first offering it for not less than thirty days to the landlord at a valuation, as thereinafter provided for, be entitled to dispose of the said colliery under the conditions of the lease to any other party approved of by the landlord.

The said Robert Brand continued in possession of the colliery down to the date of his death in 1873. His trustees, who were called as defenders, managed the colliery for behoof of his only son, Robert Brand junior, until his death in July 1873. He left a testamentary trust-disposition and settlement, and his trustees were called as defenders. As Robert Brand junior died in minority, a dispute arose as to his succession, including the colliery, and a litigation was instituted in the Court of Session. The pursuer, who had been making complaints for some time, on the 3d of February 1874 intimated to the trustees of Robert Brand senior that being dissatisfied with

the working of the colliery he had resolved to resume the same in terms of the minute of agreement of 5th October 1869, and requested that the arbiters named therein should proceed with the valuation. No notice of the intimation was taken, and the present action was raised.

The defenders in their defences stated that the pursuer had raised the action, not in consequence of any *bona fide* dissatisfaction with the defenders' management of the works, but in the hope of being thereby enabled to carry out certain negotiations and secure an advantage, and they pleaded that the statements of the pursuer were not relevant or founded on fact.

On the 30th June the Lord Ordinary (SHAND) allowed parties a proof of their averments, and on 15th January 1875 issued the following interlocutor:—“Having considered the cause, Finds that by minute of agreement, dated 5th October 1869, entered into between the pursuer, proprietor of the estate of Coltness, and the late Robert Brand, coalmaster, Wishaw, with reference to the lease of Greenhead Colliery, then current, and which had been granted to the said Robert Brand and Jonathan Hyslop, coalmaster, Wishaw, it was provided, *inter alia*, that in the event of the death of the said Robert Brand the pursuer was thereby empowered, if he so wished, to enter on and resume possession of the colliery, and other subjects of the said lease of the Greenhead Colliery at a valuation as therein provided for, if he should at any time thereafter be dissatisfied with the working of the colliery. Finds that the said Robert Brand died on 26th January 1873: Finds that, in exercise of the powers conferred on him by said minute of agreement, the pursuer by letter, dated 3d February 1874, sent by his directions and authority by his agents to the defenders, intimated that he was dissatisfied with the working of the said colliery by the representatives of the said Robert Brand, and had resolved to resume possession of the colliery in accordance with the power to that effect contained in said minute of agreement: Finds that the defenders have failed to instruct that the pursuer was not at the date of the said notice truly dissatisfied with the working of said colliery by the representatives of the said Robert Brand, and that the said notice was not given by the pursuer *in bona fide*;—Therefore decerns in terms of the declaratory conclusions of the summons, ordains the defenders to concur with the pursuer in taking steps for having a valuation of the plant and machinery connected with the colliery, including waggons, if any, ascertained in terms of the said minute of agreement, and decerns *ad interim*. Finds the pursuer entitled to expenses, allows an account thereof to be given in, and remits the same to the auditor to tax and to report: Farther, grants leave to the defenders to reclaim against this interlocutor.

“*Note*.—This case is certainly attended with difficulty, and looking to the whole circumstances, and having in view the fact that the coal which forms the subject of the lease is so far exhausted that it may be wrought out possibly before a final decision can be obtained, I retain the opinion strongly expressed at the close of the debate on the proof, that a settlement is most desirable for all parties. As, however, the parties have not succeeded in coming to an arrangement, I have carefully considered the evidence, and have come to the conclusion, that while there is much room

for discussion, the pursuer is entitled to the decree which he asks.

"By the minute of 5th October 1869 the pursuer, in consideration of his agreement to accept the late Robert Brand as sole tenant under the lease of the Ell coal in the lands of Greenhead, then current between him and Mr Brand and Mr Hyslop, was empowered 'in the event of the death of the said Robert Brand during the currency of the lease, . . . if he so wishes, to enter on and resume possession of the colliery and other subjects of lease at a valuation as afterwards provided for, if he should at any time thereafter be dissatisfied with the working thereof by the representatives of the said Robert Brand.

"This clause undoubtedly gives very extensive power to the landlord. Before the agreement was entered into serious differences had arisen between Mr Brand and his partner Mr Hyslop, which had resulted in litigation; and Mr Brand was evidently anxious to secure the lease entirely to himself, so far as the landlord was concerned, and prepared to make important concessions with this object. The pursuer, on the other hand, was apprehensive, in consequence of Mr Brand's state of health, that the colliery might not be conducted with sufficient energy, and it was a matter of great consequence to him to have the coal rapidly worked out, not only for the return of rent, or lordship to be got from the colliery itself, but also because until that coal was worked out the Coltness Iron Company, his tenants on the lower seams, which are of considerable value, were almost at a standstill with their operations, and considerable loss was taking place from this cause. For this reason he stipulated that in a certain contingency he should be entitled to resume possession of the colliery even during Mr Brand's life, and that in the event of Mr Brand's death he should have the same power, if he should at any time be dissatisfied with the working of the colliery; and these terms were agreed to.

"The effect of this stipulation, on the terms of which the present case turns, was to empower the landlord to resume the colliery, and take possession of the plant at a valuation as therein provided, if at anytime he was himself dissatisfied with the working of the colliery by the tenants' representatives succeeding after his death. The tenant consented to the question of dissatisfaction on the landlord's part being left to the determination of the landlord himself, and did not require or stipulate for any judgment or determination by a third party as arbiter. No question was to be submitted to a disinterested person as referee. The landlord was accepted as the arbiter in the matter in which he was himself interested.

"It has been maintained for the tenants that, as the exercise of the landlord's power under the agreement is challenged by them, the landlord is bound to show by sufficient evidence that reasonable grounds existed for his dissatisfaction, and that if the court should be of opinion that he was acting unreasonably, or without sufficient grounds, he is not entitled to exercise the power. I cannot, however, adopt this view. By the agreement it has not been left either to the Court, or to any other party than the pursuer, to say whether sufficient grounds for dissatisfaction in point of fact exist. Persons may fairly differ in opinion on such a question. One person may be satisfied with grounds of dissatisfaction which, in the opinion of others,

are quite insufficient. The Landlord may deem certain grounds of dissatisfaction as sufficient, which the Court or an arbiter might think insufficient; but as to this, provided he is acting honestly and in good faith, he is by the terms of the agreement the sole person to decide. The Court may be of opinion on the proof that when the notice was given good reasons for dissatisfaction did not exist; but the question to be solved is, not whether such reasons existed, or whether the Court shall be of opinion that such reasons existed, but whether the pursuer was truly dissatisfied with the working of the colliery on grounds satisfactory to his mind. If this was the case, the pursuer is entitled to resume the lease.

"There is no dispute as to the meaning of the words 'the working of the colliery.' Neither party contends that they are to be read in the limited sense of referring to the underground operations in the colliery. They plainly refer generally to the carrying on of the business, including not only the underground working, but the output and sale or disposal of the coal.

"The pursuer on 3d February 1874 intimated that he was dissatisfied with the working of the colliery, and required the defenders to give up possession. This notice must be accepted in the first instance as sufficient to enable the pursuer to exercise the power which the agreement gives him. For the reasons I have stated, the defenders, on disputing the effect of the notice, are not, I think, entitled to have the case decided on the issue whether the landlord had reasonable grounds for dissatisfaction. The issue on which the case turns must, I think, be, 'Was the landlord, when he gave the notice, in point of fact dissatisfied with the working of the colliery?' On this point the defenders allege (answer to cond. 18) that the pursuer 'has raised the present action not in consequence of any *bona fide* dissatisfaction with the defenders' management of the works, but in the hope of being able to carry out certain negotiations with another party, and so as to secure a *bonus*, or goodwill, or price for the lease.' This averment amounts to a denial of the truth of the pursuer's notice, that he was dissatisfied with the working of the colliery, and an averment that he had given the notice not in *bona fide*, or because of dissatisfaction with the working of the colliery, but entirely for the purpose of gain to himself.

"In consequence of this averment proof became necessary; and in disposing of the proof it appears to me that the pursuer having formally intimated his dissatisfaction by the notice of 3d February, the *onus* lies on the defenders to instruct their defence, as I have now stated it. In order to succeed, the defenders must, I think, show that the notice was untrue, in so far as it bore that the pursuer was dissatisfied with the working of the colliery. If, in fact, he was so dissatisfied, it appears to me that his right to resume possession of the colliery cannot be affected by the circumstance that he had at the time, as appears to be the case, arranged to let the coal on terms more advantageous to himself than were contained in Mr Brand's lease. Assuming that he was really dissatisfied with the working of the colliery, and was to resume the lease, he was entitled to let the coals to a new tenant on the most advantageous terms he could obtain.

"I do not think it necessary to enter very fully on a consideration of the evidence which has been

adduced. The pursuer has distinctly deponed that when the notice of 4th February was given he was in fact dissatisfied with the working of the colliery. At that time fully a year had elapsed from the date of Mr Brand's death. In the meantime the colliery had been in the hands of the trustees, who had carried on the operations and business until 3d July 1873, in the hope that Mr Robert Brand jun., the original tenant's only son, would be able to take up the lease. On that date, however, Mr Robert Brand jun. died, before attaining majority. The right to the lease then devolved on Alexander Brand, a brother of the original tenant, but while the colliery was still under the management of Robert Brand's trustee he also died, on the 5th of November 1873. Questions had arisen between Alexander Brand and his brothers and sisters in regard to the rights of succession to the late Robert Brand, the original tenant, and his son. These questions were arranged under an agreement, by which Alexander Brand had undertaken to collate the heritage with them, including the right to the lease in question. At Alexander Brand's death it was found that he had left a trust-disposition and settlement in favour of trustees, to whom the trustee of the original tenant Robert Brand transferred the colliery on 19th January 1874; and Alexander Brand's trustees were in possession of the colliery and carrying on the business when the pursuer's notice was given.

"The pursuer in his evidence states the reasons of his dissatisfaction with the working of the colliery to have been that the output had diminished considerably, and that there had also been a failure to remove a quantity of moss which had also burst into the workings, and which the tenant had bound himself to remove under an agreement contained in letters between the parties, dated 11th October 1871; that he was of opinion that there was a want of energy in the carrying on of the colliery; and that it was also a cause of dissatisfaction to him that the work was in the hands of a body of trustees and no practical man at the head of the concern with whom he could deal. The parole proof adduced by the pursuer clearly corroborates his evidence; and if the case had stood there, it would, I think, have presented no question raising any difficulty. The defender's evidence was directed to show that every effort had been made to carry on the operations at the colliery with proper skill and attention, and that they had raised and disposed of as much coal as was in their power; and I may say that I think the evidence shows that the mineral workings were properly carried out, and that the defenders—at least the defenders the trustees of Robert Brand—made considerable exertions in order to make the most of the business. The question, however, being whether the defenders have thereby succeeded in showing that the pursuer was not, in point of fact, dissatisfied with the working of the colliery, the evidence now referred to plainly does not establish this.

"Referring, in the meantime, specially to the period between the beginning of November 1873 and the landlord's notice of February 1874, the proof contains not only the evidence of the pursuer to the effect that he was dissatisfied during that period, and that his adviser Mr Landale and his factor Mr Bain entertained the same feeling, but also the evidence of Mr Landale and Mr Bain to this effect. In addition to these, it is proved by

John Brand, one of the defenders, and by Mr Bain, that at Martinmas 1873 Mr Bain complained of the want of output at the colliery. Mr Andrew, the defender's cashier, refers to a similar complaint. And Mr William Robertson, another of the trustees, who was himself for some time in negotiations with the landlord for taking over the colliery, states that in the end of 1873 Mr Bain expressed a wish to him that the colliery should be placed in his hands in order that it might be carried on with energy, which he understood Mr Bain to consider was wanting in the management of the trustees, and with his acquiescence the letter dated 16th December 1873, was written by Mr Bain to the trustees' agent, intimating that 'the present miserable output from the pits renders it necessary for the landlord to interfere very shortly,' unless the trustees should have the matter wound up. There are two letters by Mr Bain to the pursuer, dated 2d and 4th January 1874 respectively, which contain expressions calculated to convey to the pursuer that there was much want of energy in carrying on the colliery, and that this was Mr Bain's opinion. The evidence which I have thus generally noticed is, in my opinion, sufficient to show that dissatisfaction in the working of the colliery did exist in the pursuer's mind at the date of the notice, even if it were incumbent on the pursuer to instruct this as matter of fact by evidence beyond the notice.

"Against this evidence the defenders rely on the terms of a number of letters which were produced on their call at the close of their proof by Mr Beith the landlord's agent, consisting of communications passing between Mr Landale, Mr Bain, and the pursuer. It was not without difficulty that I admitted these documents at the stage of the case at which they were called for. But in a case in which the question really is, what was the state of the pursuer's mind when the notice was given, and in which the pursuer must obviously have been influenced to a great extent by the communications made to him by his factor and mining engineer on matters which were necessarily beyond his own observation, it appeared clear that such letters might have an important bearing, and that injustice might be done if they were not admitted. It is very unfortunate, however, that the call for these was not made before the proof began, for it was certainly the duty of the defenders, if they meant to found on such documents as part of their case, to have had them in process before the proof, or at least to call on the parties to bring them to the trial, and in any view to have made the correspondence the subject of cross-examination of the parties to it. In consequence of the lateness of the call the parties were allowed to give their evidence very much on mere recollection, without reference to documents which would have refreshed their memory, and it may be to some extent have modified the terms of their depositions. In so far as disadvantage arises in disposing of the case on the proof from the stage at which the documents were put in, I think that disadvantage must clearly rest with the defenders. It was suggested that it was not clear to the defenders that they had right to recover the documents until the pursuer had been examined, but I see no ground for this. In a case in which the *bona fides* of the pursuer was challenged, I should have had no doubt the defenders were entitled to recover the communications with the landlord and factor and mining engineer, from

whom he derived most of his information as to the working of the colliery.

"Turning, however, to the correspondence referred to, I think it presents a strong case in favour of the defenders, if the question between the parties had arisen in regard to the notice referred to in the proof which was sent to Mr J. M. Robertson, one of the defenders Robert Brand's trustees, in September 1873, for at or shortly before that date Mr Bain had in repeated letters intimated to the pursuer his strong opinion that the colliery was being satisfactorily carried on, and doing well under the management of a practical trustee, viz., Mr John Brand, who had been himself for many years a coalmaster. Mr Bain's letter of 2d September, towards the end of the correspondence referred to, is very important on this question. The pursuer in his evidence states that the notice of September was sent by his directions and authority; but I am disposed to think from the letters, to which attention was not called, that he is mistaken in this, and that the notice was sent by his agent after a meeting with Mr Landale, at what was considered by them to be a proper time, and while he was at Oban, or at all events when there was no opportunity for communicating with him before the notice was served. The notice of September, however, was practically withdrawn, and it is unnecessary to decide the question whether it would or would not have been effectual. Considerable changes took place between September and February. Alexander Brand died on 5th November, and his trustees took possession in January, and I am of opinion that, whatever may be said of the pursuer's mind and feeling in September, not only have the defenders failed to show that he was satisfied with the working of the colliery in February, but that, on the contrary, his dissatisfaction has been proved. One of the pursuer's grounds of dissatisfaction, as stated by him, was, that there was, as he believed, a want of energy, evidenced by a diminished output, and the want of a responsible practical man at the head of the concern. It has certainly been shown that Mr John Brand took a considerable charge down to 19th January, and that the diminished output was caused by the want of waggons, which the defenders' servants and some of themselves frequently pressed the Railway Company to supply. This evidence at the best, however, only goes to support the view that the pursuer had not sufficient grounds for his dissatisfaction, which is not the question to be determined, and even on that question I am not prepared to say the pursuer was not right. The successful or satisfactory 'working of the colliery' might in a great measure depend on its being conducted by a business man of energy, who was himself directly interested in the result, and so would be induced, at a time of extraordinary competition, to make corresponding exertions, involving much time and labour, and the unremunerated actings of Mr John Brand, who had retired from business on his own account, might be greatly short of what was required. Even his management ceased on 19th January, and however much Mr M'Creath's inspections thereafter might secure—what indeed Mr Anderson seems to have been quite capable of doing—a proper system of underground operations, they would not supply that energetic general management which the pursuer thought necessary to make the working of the colliery satisfactory. And so also as to the deficiency of waggons caus-

ing the diminished output, there is much in the pursuer's view, either that the tenant should have kept his own waggons, as some other colliery owners and tenants did, and not have disposed of them to the company, or that waggons would have been got had there been in the management an efficient head having a direct interest in the colliery, in place of trustees with divided responsibility, and probably less personal interest in the business, and servants under them.

"The defenders maintain they have established a want of *bona fides* on the pursuer's part, by the evidence showing that the pursuer, before giving the notice, had evidently made the best bargain he could for reletting the colliery; that he let it for a higher lordship, and on an obligation by the new tenant to undertake the litigation which he had reason to expect would ensue with them. It appears to me, however, that the evidence as to this new arrangement is not entitled to the effect which the defenders seek to attach to it. Believing, as I do, that the pursuer, when he gave the notice of 3d February, was dissatisfied with the working of the colliery, and was therefore resolved to resume the lease, so as to take it from the defenders, he was entitled, in arranging for another tenant, to make the best bargain he could; and he seems to have stipulated that the working should be energetically carried on.

"The pursuer at the close of the proof objected to the title of the trustees of Alexander Brand to take up and hold the colliery, and thereupon Alexander Brand's eldest son and heir, a pupil, was sisted as a party by minute and interlocutor of 9th December last. This meets the pursuer's objection. The fact remains, however, that the tenant is a pupil, and that his tutors are persons unacquainted with mining business, and further, that they are carrying on the colliery really for the benefit of the trust; and all this affords an additional element which the pursuer was entitled to have before him, and seems indeed to have had in view, in coming to the conclusion to give notice."

The defenders appealed this judgment.

Cases cited—*Roseberry*, 7th March 1811, F.C. *Shaw Stewart*, 1 W. and S., 68; *Murray*, Hume, 825.

At advising—

LORD JUSTICE-CLERK—I am clear it is not the meaning of the clause that the landlord should prove sufficient or reasonable ground of dissatisfaction. As to the fact of dissatisfaction, I incline to think it is enough if the landlord has an opinion to a certain effect in his own mind. The parties left the matter to his determination and conscience. Further, I think the pursuer has vindicated his action—the defender has not proved *mala fides*. I am clear that the onus lay on the defender of proving that the action taken by the pursuer in giving the notice was dishonest, and I think he has failed to do so. The existing lease was to the pursuer's prejudice in three particulars. He had to deal with representatives, not with principals, and that was a material injury. Then the output was diminishing, and it is of no moment to say that that was not the fault of the tenants, it was a ground of dissatisfaction with the working of the colliery. In the third place, there were two separate leases of separate seams, which necessarily came into collision with each other. Even if the

landlord, under this clause, was bound to show reasonable cause for dissatisfaction, which I am clear he is not, I think he has done so.

I think there has been some laxity in admitting etters as evidence which were not put before the witnesses at the proof.

LORD NEAVES—I concur. This case is important as to the relations of proprietor and tenant. I am not quite satisfied with the way in which it has been matured by the Lord Ordinary. There is no qualification of the interlocutor of July as being before answer, and a good deal of irrelevant evidence has been admitted. I do not say a cause such as this may not be got behind on the ground of the dissatisfaction being a fraudulent pretence for ulterior purposes, but there is nothing of that kind here. We have the landlord affirming on oath that he was dissatisfied. He was no doubt acting for his own interest, but his evidence is above suspicion. He had a sincere feeling of dissatisfaction, and probable cause for it, and he is entitled to act on his own advice, and take advantage of the qualification in the lease.

I concur with your Lordship that Bain's letters should not have been admitted without his being examined on oath as to them.

LORD ORMIDALE—I concur without difficulty. It is important to keep in view that the tack was originally conceived in favour of Hyslop and Brand, and was not taken to survivors, and there is some evidence that Hyslop was chiefly relied on. While the dispute between Hyslop and Brand was going on the minute of agreement was drawn up, and the landlord agreed to take Brand as sole tenant. So far as we can see the landlord might then have got rid of both. The clause here is different from any previous one. It was not framed by a professional man. It is not if there are grounds of dissatisfaction, or if the colliery is not fairly and properly worked, but if the landlord should be dissatisfied with the working. In reality this puts the matter into the almost arbitrary power of the landlord. All he had to do was to satisfy himself he was dissatisfied, and express this dissatisfaction. The defenders say we shall prove the landlord was not really satisfied. They might have referred the matter to the landlord's oath, and satisfied the Court that really the landlord was quite satisfied. The Lord Ordinary allowed a proof. I would have laid the onus on the defenders. The Lord Ordinary lays the onus on neither party. The question comes to be—was the pursuer in *mala fide* in giving the notice he did? I am clear he was not. On the contrary, the evidence shows that he was most considerate and indulgent, and the correspondence, especially the letters of 1st and 22d August, are conclusive as to his *bona fides*.

LORD GIFFORD—I am of the same opinion. The question turns on the true intention and legal effect of the clause in the minute of agreement. My opinion is that the clause refers only to the mind of the landlord, not to the condition of the colliery, and that to get behind it there must be an averment of *mala fides* or fraud, and that unless it is proved the pursuer acted fraudulently in giving the notice he must succeed. The Court has nothing to do under this clause with the reasonableness of the grounds of dissatisfaction, but solely with the *bona fides* of the dissatisfaction. I view the issue as

being—Was the notice given fraudulent and *mala fide*? I am clear it was not.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel on the Reclaiming Note for Alexander Brand's trustees against Lord Shand's interlocutor of 15th January 1875, Refuse said note, and adhere to the Lord Ordinary's interlocutor, with additional expenses, and remit to the Auditor to tax the same and to report; farther, remit the cause to the Lord Ordinary, with power to decern for the expenses now found due.”

Counsel for Reclaimers—Dean of Faculty (Clark) and Alison. Agent—Alex. Morrison, S.S.C.

Counsel for Respondents—Solicitor-General (Watson) and Mackintosh. Agents—Murray, Beith, & Murray, W.S.

Tuesday, May 18.

SECOND DIVISION.

[Sheriff Court, Leith.

M'INTOSH v. LEITH COMMISSIONERS OF POLICE.

Road—Statute 25 and 26 Vict., c. 101, secs. 151, 152—Private Street—Allocation.

Held (1) that the lighting, watching, and cleaning of a thoroughfare by the police of a burgh is insufficient to constitute maintenance as a public street within the meaning of the Police Improvement (Scotland) Act 1862; (2) that the powers of the Commissioners are not exhausted by their making an abortive allocation, but they may still proceed to allocate *de novo* the expense of making a public street.

This was an action raised by the Leith Police Commissioners against William M'Intosh for payment of a sum of £50, being his proportion of costs, charges, and expenses incurred in respect of paving the private street called Livingstone Place.

The pleas ultimately maintained in defence were:—1. That Livingstone Place was not at the date of the operations in question a private street, having been maintained as a public street prior to the adoption of the Act 25 and 26 Vict., cap. 101, by the burgh of Leith. 2. That the assessment sued for was not imposed legally or in terms of said Act.

It appeared from the proof in the cause that the Police Improvement Act was adopted by the Burgh of Leith in October 1872, and that before the operations mentioned in the summons Livingstone Place had not been paved and flagged in any way, but had been patrolled and cleaned by the police and also lighted by them. It was causewayed in January and February 1873.

The Commissioners of Police made an allocation of the expenses of foresaid operations in March 1873 under section 151 of the Police Act of 1862.

Against that allocation appeals were lodged, which were sustained by the Paving Committee. On 18th April 1873, a re-allocation was made under section 152 of the Police Act. Against that allocation appeals were lodged, which were